

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

OCT 14 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of	)	MM Docket No. 93-88
EZ COMMUNICATIONS, INC.	)	File No. BRH-910401C2
For Renewal of License of FM Radio	)	
Station WBZZ(FM) on Channel 229B	)	
at Pittsburgh, Pennsylvania	)	
ALLEGHENY COMMUNICATIONS GROUP,	)	File No. BPH-910628MC
INC.	)	
For Construction Permit for	)	
a New FM Broadcast Station on	)	
Channel 229B at Pittsburgh,	)	
Pennsylvania	)	

To: Honorable Edward Luton  
Administrative Law Judge

MEMORANDUM RE ADMISSIBILITY OF ALLEGHENY EXHIBITS 3 AND 4

Allegheny Communications Group, Inc. (Allegheny), by its attorneys, now submits its memorandum in support of the admissibility of Allegheny Exhibits 3 and 4. This memorandum is being submitted pursuant to the Presiding Judge's request at the October 13 admissions session.

Allegheny Exhibit 3 is the arbitrator's decision in the proceeding between AFTRA and EZ Communications, Inc. (EZ) holding that Liz Randolph had been subjected to "vile and lewd insults" and "a serious invasion of her personal rights and dignity." Allegheny Ex. 3, P. 16. Allegheny Ex. 4 is the federal district court opinion enforcing the arbitrator's

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opinion. Both exhibits should be admitted into evidence as evidence of EZ's non-compliance with the Commission's equal employment opportunity (EEO) policies. At minimum, the exhibits must be received into evidence as rebuttal to EZ's direct case exhibits which attempt to show that EZ should receive credit for its EEO performance.

The Commission has a broad EEO policy under which:

broadcast stations are prohibited from discriminating on the basis of race, color, religion, national origin, or sex and are required to carry out a continuing program designed to foster equal opportunity in all aspects of their employment policy and practice.

Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Rules, 2 FCC Rcd 3967, 63 RR 2d 220, 222-223 (1987) (emphasis added). The misconduct of EZ described in the arbitrator's opinion falls well within the scope of conduct prohibited by that policy. The Commission has recognized that sexual harassment is a form of discrimination. In Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (1993), affirming in pertinent part 6 FCC Rcd 925, 68 RR 2d 1419 (Rev. Bd. 1991), the Commission recognized that a lawsuit that resulted in a finding of sexual harassment was a

"discrimination suit". The arbitrator's opinion makes clear that what he found was a form of sexual harassment:

Constitutional protections, however, do not mean that an individual of reasonable sensibilities must be unwillingly bombarded or subjected to such forms of free speech, at least not as a mandated job requirement or within the confines of one's work environment. I find a parallel exists in this situation with circumstances that precipitated and are now governed by the Federal Government's Sexual Harassment Laws. An employee no longer has to put up with a hostile work environment that is created on the basis of sex, be it in the form of jokes, comments, suggestions, touching, etc.

Allegheny Ex. 3, P. 15.

There is no doubt that EZ's employment practices were at issue in the proceeding. The arbitration specifically found that EZ terminated Ms. Randolph "for flagrant neglect of duty" for her reaction to the hostile work environment established by EZ and its disc jockeys. Allegheny Ex. 3, Pp. 8-9. The pertinent points insofar as the Commission's EEO policy is concerned are the existence of a hostile work environment for Ms. Randolph and her termination. Furthermore, the "jokes" in question were part of EZ's programming: they were broadcast over WBZZ(FM). See Allegheny Ex. 3, Pp. 6-8, Allegheny Ex. 4, P. 3. The exhibits in question thus relate not only to EZ's employment practices but to its programming.

EZ's EEO practices and compliance with the Commission's EEO policies are at issue in this proceeding. "No review of a licensee record can fail to reflect whether it has complied

with the strictures set down to govern a broadcaster's conduct." Metroplex Communications, Inc., 4 FCC Rcd 8149, 8153, 67 RR 2d 185, 192 (Rev. Bd. 1989), citing Central Florida Enterprises, Inc. v. FCC, 683 F.2d 503, 505 (D.C. Cir. 1982). In GAF Broadcasting Company, Inc., 8 FCC Rcd 5496, 5499 (1993), the Commission confirmed:

allegations involving a licensee's violation of the Act, rules or policies can be relevant in the determination of the weight to be given to a licensee's claim to renewal expectancy.

The Commission specifically held that evidence relating to a licensee's EEO program could be relevant to its claim to a renewal expectancy even if the evidence does not warrant a basic qualifications issue. It also held that ALJs have the discretion to consider evidence of a licensee's EEO performance under renewal expectancy. Allegheny has provided specific evidence concerning EZ's EEO practices, which is relevant to EZ's claim to a renewal expectancy.

Furthermore, EZ has subjected its EEO performance to scrutiny by offering into evidence two exhibits (EZ Exhibits 3 and 4) which attempt to show that its EEO program was meritorious. EZ is attempting to obtain affirmative credit for its EEO program. Allegheny has an absolute right to show that EZ did not comply with the Commission's broad EEO policy. The Presiding Judge may not allow EZ to present affirmative evidence while arbitrarily preventing Allegheny from

presenting evidence on the same matter. If the Presiding Judge rejects Allegheny's evidence, and any higher authority determines that the evidence should have been admitted, a remand will be necessary. Such a possibility should be avoided.

The Hearing Designation Order does not preclude consideration of this evidence. Unless the Hearing Designation Order contains a reasoned analysis of the matter at issue, the Presiding Judge is not bound. Atlantic Broadcasting Company, 5 FCC 2d 717, 8 RR 2d 991 (1966). In Paragraphs 10 and 11 of the HDO, Allegheny's request for a EEO qualifications issue against EZ was denied. The HDO, however, did not consider whether that evidence was relevant to EZ's renewal expectancy claim. Since there is no reasoned analysis of that question in the HDO, the Presiding Judge is free to consider Allegheny's exhibits with respect to renewal expectancy.

At the admissions session, EZ argued that Allegheny's exhibits were irrelevant because the HDO found that the Commission's EEO rule was not violated in connection with the Randolph matter. Paragraph 11 of the HDO can be read to limit the EEO rule to discrimination relating to the "recruiting, hiring, and promoting" of employees.<sup>1</sup> As noted above,

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<sup>1</sup> Allegheny strongly disagrees with this interpretation. Under the HDO's interpretation, it would not be a rule violation to terminate an employee because of the employee's race or sex. The rule (as opposed to the broader

however, the Commission also has a much broader policy prohibiting discrimination in all aspects of a broadcaster's employment policy and practice. Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, supra. The HDO made no determination as to whether EZ's conduct was consistent with the Commission's broader EEO policy, and the Presiding Judge is thus free to consider that question. Atlantic Broadcasting Company, supra.

The Commission has regularly imposed sanctions against broadcasters that did not comply with its broad EEO policy, even if the conduct did not violate the specific provisions of its EEO rule. For instance, prior to 1987, the requirements currently contained in Sections 73.2080(b) and (c) of the Commission's rules were not part of the EEO rule but were part of the Commission's general EEO policy requirements. Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, supra, 2 FCC Rcd at 3968-3969, 63 RR 2d at 224-226. These requirements included the duty to use organizations and other sources that will refer minority and female applicants, as well as the duty to evaluate one's

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policy) would become a nullity because any hired employee could be promptly fired (as Ms. Randolph was) for discriminatory reasons. The Allegheny exhibits are admissible, however, regardless of how the rule is interpreted.

employment profile and EEO program. Notwithstanding the fact that these requirements were not part of the rule before 1987, the Commission imposed sanctions against broadcasters that did not comply with the policy. For example, in Auburn Broadcasting Co., 57 RR 2d 1427, 1430-1431 (1985), reporting conditions were imposed on a licensee that failed to make adequate efforts to affirmatively recruit minorities. See also Richey Airwaves, Inc., 53 RR 2d 330 (1983). In L.M. Communications, Inc., 7 FCC Rcd 829, 70 RR 2d 864 (1992), a licensee was admonished to improve its EEO program even though no specific violation of the EEO rule was found.<sup>2</sup> EZ's violation of the Commission's general EEO policy can thus be used against it even if its conduct did not violate the literal language of the Commission's rules. In GAF Broadcasting Company, Inc., supra, the Commission held that evidence of "violation of the Act, rules or policies" was cognizable under renewal expectancy (emphasis added). Since any ruling of the HDO was limited to the language of the rule, the Presiding Judge is free to consider Allegheny Exhibits 3 and 4 as evidence concerning EZ's compliance with the Commission's EEO policies.

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<sup>2</sup> An admonishment is a cognizable sanction against a licensee. In Meredith Corp. v. FCC, 809 F.2d 863, 869, 62 RR 2d 89, 95 (D.C. Cir. 1987), the court held an "implicit admonition" that the Fairness Doctrine had been violated "could be used against the licensee in a renewal hearing." Allegheny is trying to use EZ's misconduct against it in this renewal hearing.

Consideration of these exhibits will not unduly prolong the hearing. There is no reason why EZ should be allowed to relitigate the facts found in the arbitrator's opinion. It had a full and fair opportunity to litigate these facts, and it had every incentive to develop the most favorable record it could.<sup>3</sup> While it will have the opportunity to argue that its conduct should not detract from its renewal expectancy showing, there is no requirement that the Presiding Judge repeat the fact-finding already undertaken by the arbitrator. The Presiding Judge must take whatever action is necessary to ensure the development of a complete record, and such actions will not unduly disrupt or prolong the hearing.

Allegheny Exhibits 3 and 4 are relevant evidence of EZ's compliance with the Commission's EEO policies. The evidence is relevant to EZ's claim to a renewal expectancy, and EZ has placed its EEO record in issue in its direct case. The Commission has held in GAF that such evidence may be considered. The Hearing Designation Order does not bar the Presiding Judge from considering this evidence. Furthermore,

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<sup>3</sup> All of the requirements for collateral estoppel are present here. See Imagists, 4 FCC Rcd 3749, 66 RR 2d 928, 929 (Rev. Bd. 1989). To the extent the issue is the facts concerning EZ's termination of Ms. Randolph, the same issue was present in both the arbitration proceeding and this proceeding. Because EZ did not appeal from the federal district court's opinion, the adjudication was a final judgment on the merits. EZ was a party to the proceeding. Finally, EZ had a full and fair opportunity to litigate the facts.



acceptance of the exhibits will eliminate the possibility of a remand on this point.

Accordingly, Allegheny asks the Presiding Judge to admit into evidence Allegheny Exhibits 3 and 4.


Respectfully submitted,

**ALLEGHENY COMMUNICATIONS GROUP, INC.**

By

  
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Date: October 14, 1993

**CERTIFICATE OF SERVICE**

I, Dana Chisholm, do hereby certify that on the 14th day of October 1993, a copy of the foregoing "Memorandum re Admissibility of Allegheny Exhibits 3 and 4" was hand delivered to the following:

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